

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**COLGAN AIR, INC.,**

**Appellant,**

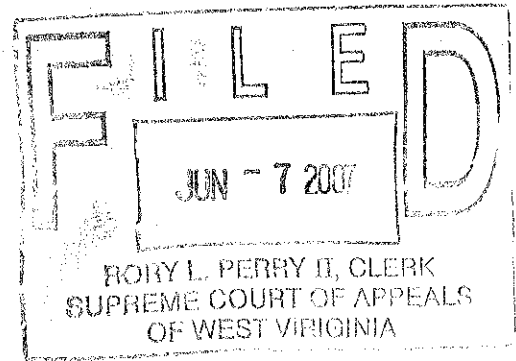
**v.**

**APPEAL NUMBER: 070285**

**(West Virginia Human Rights Commission  
Docket No. ERRELNOANCSPREP-391-02)**

**WEST VIRGINIA HUMAN RIGHTS  
COMMISSION AND RAO ZAHID KHAN**

**Appellees.**

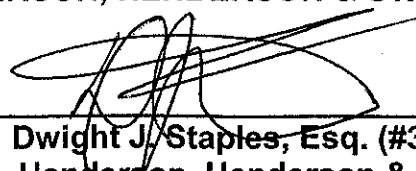


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**BRIEF OF THE APPELLEE, RAO ZAHID KHAN**

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## INTRODUCTION

The Final Order of the West Virginia Human Rights Commission accurately reflects an extremely dangerous and hostile work environment wherein no steps were taken by middle or upper management of the appellant to investigate or properly remedy these outrageous actions until the life of the appellee, Rao Zahid Khan, and his wife were threatened and the Huntington Police Department had to be notified. Mr. Khan endured daily incidences of harassment for at least eleven (11) months.

Rao Zahid Khan is a male whose race is Asian, his religion is Muslim, and his national origin and ancestry is Pakistani. He moved to the United States when he was sixteen (16) years old and lived here continually since that time. He was a graduate of State University of New York where he received a bachelor degree in aeronautical science. Mr. Khan had worked as a traffic watch pilot, flight instructor, trainee pilot and regional airline pilot at the time he applied for employment with the petitioner, Colgan Air, Inc. He had one thousand seven hundred twenty hours (1,720) of flight time prior to his employment with this appellant.

The following is just some of the incidences of the hostile work environment acknowledged by the Administrative Law Judge in his Findings of Fact Numbers 5, 6, and 7:

5. During his employment with Respondent, Complainant was subjected to an extremely hostile environment in which repeated and constant outrageous insults were directed toward him by fellow employees, Captains, Terry Riley, Jimmy Galbrath and Ryan Heuston. They referred to Complainant as **"sand nigger"**, **"rag head"** and **"camel Jockey"**. They said he **stunk**, that he **wasn't very intelligent** and that **he doesn't speak good English**. Captain Riley would repeatedly say things directly to Complainant like **"You guys are terrorists"**, **"Are you a Muslim?"**; **"All Muslims are terrorists."** Captain Riley said that **he would do anything to make sure Complainant did not get promoted** and that **he would do anything to get Complainant fired**.

Additional insults included, **"Why don't you get a job with Pakistani Airlines?"** On another occasion, Captain Riley came on board an airplane that Captain Duncan was on after a female pilot had shot a low visibility approach, and stated, **"That Fucking Bitch can't fly. I've been flying all morning with a Fucking Arab and he can't fly either."** Tr. Vol. I, pages 179, 183, 190, 191, 248, 250, 253 and 254; and, Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, page 25.

6. Captain Riley also made sexually offensive comments directly to Complainant; including; **"Why does your wife not work?"**; **"Do you have an arranged marriage"**; and, even asked, **"How's your wife in bed?"** One of the worst comments made was made in the presence of Pam Jarrell, a woman working as a customer service agent, when Captain Riley said that **the Complainant "would not be able to eat his wife and that it probably tasted like chicken anyway."** This was in reference to the fasting strictures of Complainant's faith. That same individuals also heard both **Captain Galbrath and Captain Riley say they would do anything to get Complainant fired and that he would not pass his proficiency flight.** Tr. Vol. I, pages 190, 192, 196, 249 and 250.

7. Both the **Complainant and Ms. Jarrell complained about the discriminatory conduct toward Complainant to the Lead Pilot for Respondent at the Huntington West Virginia crew base, Captain David Mayers.** Ms. Jarrell testified credibly that Captain Mayers knew these acts were occurring and that "other flight crews" and just about **"everyone" knew it was going on. Complainant estimates he went to Dave Mayers about twenty to twenty-five times about the behavior of Captain Riley.** Ms. Jarrell was specific with Captain Mayers that the dislike was a result of the fact that Complainant was "Middle Eastern". Captain Duncan also testified credibly that Dave Myers was aware of what he called problems between Complainant and Captain Riley (although Captain Mayers did not use the word discrimination); and that Captain Duncan had told him about the comment Captain Riley made regarding **"I've been flying with that Fucking Arab and he can't fly either."** Vol. I, pages 185-190, 253 and 254; and, Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, page 25.

The appellee, Rao Zahid Khan, stated that he was subjected to these types of comments on a daily basis for at least eleven (11) months.

Syllabus point 3 of Fairmont Specialty Services v. West Virginia Human Rights Commission, 522 S.E. 2d 180 (W. Va. 1999) is dispositive of the issue of whether this appellant violated the West Virginia Human Right Act.

3. The aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer's response to such conduct. **Instances of aggravated discriminatory conduct in the workplace, where words or actions on their face clearly denigrate another human being on the basis of race, ancestry, gender, or other unlawful classification, and which are clearly unacceptable in a civilized society, are unlawful under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to 20 (1999), and in violation of the public policy of this State.** When such instances of aggravated discriminatory conduct occur, the employer must take swift and decisive action to eliminate such conduct fro the workplace. Id. at 181.

It is quite obvious that this environment was infested with illegal discrimination and harassment. The appellee, Rao Zahid Khan, was subjected to this conduct from the date he was initially employed by this appellant, that being August 7, 2000 until July, 2001, a period of eleven (11) months.

The Administrative Law Judge then erroneously ruled in his Final Decision that there was no discrimination or harassment.

The West Virginia Human Rights Commission reviewed the Final Decision of Administrative Law Judge Robert Wilson in accordance with the standard of review outlined in West Virginia Code § 5-11-8 (d) (3) and ruled, in pertinent part, as follows:



The findings of fact of the Administrative Law Judge, in this case, reveal that **the Complainant faced egregious harassment because of his religion, ethnicity and national origin at the Respondent's facility at the Tri-State Airport in Huntington, West Virginia. The Respondent's management officials at the Tri-States Airport failed to address this harassment at the Tri-State Airport until compelled to do so by the Respondent's corporate management located at Manassas, Virginia.**

In deed, the Respondent's local management failed even to notify the corporate management in Manassas, Virginia, at all, about the harassment that was going on at the Tri-State Airport. The Complainant, himself, was required to travel to Manassas to report the harassment.

• • •

However, the **Commission is shocked that a callousness or lack of training regarding basic human rights caused middle managers at the Respondent's Tri-State Airport to simply ignore the harassment inflicted on the Complainant.** Accordingly, the Commission modifies the Administrative Law Judges decision to find that the Respondent is liable in damages to the Complainant for \$5,000.00 (sum certain) for the harassment suffered by the Complainant and in addition for the expenses he incurred in traveling to Manassas, Virginia to report the harassment to the Respondent's corporate officials – something that should have been the responsibility (at the very least), of the Respondent's local management officials at the Tri-State Airport.

• • •

The Commission also finds that the Respondent only awarded white males the opportunity to retrain on the simulator after a failed flight proficiency test in 2000 and 2001. The explanation of financial troubles offered by the Respondent as to why Complainant was not offered retraining, was inconsistent and failed to explain why Josk Musoke, an African-American was not offered retraining. Therefore, the Commission finds that not offering retraining to Complainant was, in fact, discrimination, and

finds that the Complainant should be reinstated to the next available **non-flying position** with retroactive seniority and benefits along with the opportunity to retrain.

The Commission feels strongly that sensitivity training of the staff at the Respondent's local facility at the Tri-State Airport would solve this problem. Thus, in addition to the damages awarded, herein, the Commission also ORDERS the Respondent to conduct sensitivity training in the law regarding human rights at its local facility at the Tri-State Airport in Huntington, West Virginia, preventing future instances of this inhuman treatment, demoralizing behavior, and insensitivity to all mankind no matter what race, religion, origin, or ethnicity.

The Commission proceeded to award five thousand dollars (\$5,000.00) to the complainant as incidental damages for the extreme mental anguish suffered at the hand of this petitioner. (See Bishop Coal Co. v. Salyers, 380 S.E.2d 2381 (W. Va. 1989).

The question for this Honorable Court is whether it is legal in the State of West Virginia for an employee to be subjected to this type of egregious harassment for eleven (11) months even though he complains and yet no action is taken by the employer until life and limb are threatened.

#### **STIPULATIONS DURING PUBLIC HEARING**

Counsel for the appellant, Colgan Air, Inc. stipulated that Complainant's Exhibit No. 8, the cartoon drawn and posted on the bulletin board by Captain Ryan Hueston, was offensive to the complainant's race, religion, national origin and ancestry. (Tr. Vol. 1, pgs, 275, 276).

Counsel for Colgan Air, Inc. also stipulated that the complainant experienced emotional distress as a result of the events surrounding the cartoon and events as he perceived them. (Tr. Vol. 1, p. 286)

II.

**KIND OF PROCEEDING AND NATURE OF THE  
RULINGS IN THE LOWER TRIBUNAL**

On or about February 3, 2003, the appellee, Rao Zahid Khan filed a verified amended complaint properly alleging that the appellant, Colgan Air, Inc. had engaged in one or more unlawful discriminatory practices within the meaning of Section 9, Article 11, Chapter 5 of the Code of West Virginia. The amended complaint states as follows:

- I. On or about October 30, 2001, the Respondent, Colgan Air, Inc., forced me to resign from my employment.
- II. I have been discriminated against due to my Race, Asian; my Religion, Muslim; my National Origin and Ancestry, Pakistani, my Sex, Male; and in the Reprisal Acts of the Respondent, in that;
  - A. The Respondent had employed me since August 7, 2000 as a Pilot/First Officer assigned to their Tri-State Airport facility in Huntington, West Virginia.
  - B. During the period of my employment, I was subjected to unwelcome comments and questions of a severe and pervasive sexual nature and unwelcome and derogatory comments and questions of a severe and pervasive racial and ethnic nature by a co-worker on a daily basis by the Captain I flew with and my co-workers.
  - C. When I complained about the sexually, racially and ethnically hostile working environment, the Respondent did nothing. It was only after this individual threatened my life that the Respondent placed him on a leave of absence.

- D. In an Act of Reprisal in response to my complaints, the Respondent passed me over for promotion to Captain and contrived a scenario where I failed a portion of an examination in order to create a pretextual reason to terminate my employment.
- E. I have been discriminated against due to my Race, Religion, National Origin and Ancestry, Sex and in the Acts of Reprisal of the Respondent.

This matter matured for public hearing on March 30 and 30, 2005 in the Human Rights Commission's Huntington Branch office in Huntington, West Virginia pursuant to proper notice. The Administrative Law Judge ruled that there was no discrimination or harassment in a Final Decision dated February 22, 2006. The complainant appealed to the West Virginia Human Rights Commission. The Commission modified the findings of the Administrative Law Judge in a Final Order dated December 22, 2006. Said modifications are described in the introduction hereinabove.

### III.

#### **STANDARD OF REVIEW**

Legal rulings made by the West Virginia Human Rights Commission are subject to de novo review. The standard for reviewing the findings of fact of the West Virginia Human Rights Commission is whether they are supported by substantial evidence:

"West Virginia Human Rights Commissioner's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties." West Virginia Human Rights Commission v United Transportation Union, Local No. 655, 280 S.E. 2d 653 (W. Va. 1981).

In Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Comm's, 431 S.E. 2d (W. Va. 1993), this court discussed the meaning of "substantial evidence".

Such relevant evidence, on the whole record, as a reasonable mind might accept as adequate to support a finding; it must be enough to justify a refusal to direct a verdict, if the factual matter were tried to a jury. 'This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' The reviewing court is not entitled to reverse the finding of the trier of the facts simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of the facts.

In Fairmont Specialty Services v West Virginia Human Rights Commission, 552 S. E. 2d 180 (W. Va. 1999), this Court explained the standard of review when the Commission reviews the findings of fact of an Administrative Law Judge.

The standard under which the Commission reviews a decision of an administrative law judge is established by statute. West Virginia Code § 5-11-8(d)(3) states that the "commission shall limit its review upon such appeals [from the administrative law judge's decision] to whether the administrative law judge's decision is:

- (A) In conformity with the constitution and the laws of the state and the United States;
- (B) Within the commission's statutory jurisdiction or authority;
- (C) Made in accordance with procedures required by law or established by appropriate rules of the commission;
- (D) Supported by substantial evidence on the whole record; or
- (E) Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Additionally, the Commission can determine that the Administrative Law Judge's decision is clearly not supported by substantial evidence of the whole record.

Thus, while the Commission and this Court must give deference to the findings of fact of the AALJ, the Commission is not precluded from making additional findings of fact that are not in conflict with those reached by the ALJ. **In addition, the Commission may determine that the ALJ's decision is clearly not supported by substantial evidence on the whole record.** Id. at 182.

In the present case, it is obviously clear that the Commission reviewed the Final Decision of the Administrative Law Judge in accordance with the standard of review outlined in the West Virginia Code § 5-11-8 (d) (3).

#### IV.

#### **STATEMENT OF THE FACTS OF THE CASE**

The appellee, Rao Zahid Khan, is a male whose race is Asian, his religion is Muslim, and his national origin and ancestry is Pakistani. Mr. Khan was initially

employed by the appellant, Colgan Air, Inc., on or about August 7, 2000 as a pilot in the position of first officer. Mr. Khan was assigned to the Tri-State Airport which is located in Huntington, West Virginia.

Colgan Air, Inc., is a regional airline which serves the northeast part of the United States with a crew base located in Huntington, West Virginia. (Tr. Vol. 1, pg. 20). The appellant employs more than twelve (12) people in West Virginia. (Tr. Vol. 1, p. 23).

Rao Khan was a graduate of State University of New York where he received a bachelor's degree in aeronautical science. Mr. Khan had worked as a traffic watch pilot, flight instructor, trainee pilot, and regional airline pilot at the time he applied for employment at Colgan Air, Inc. The appellee, **Rao Khan had 1720 hours of flight time prior to his employment with Colgan Air, Inc.** (Tr. Vol. 1, pgs. 233-237). In the appellant's brief, they state that "Mr. Khan had held only one previous pilot position with an airlines. (See appellant's Brief p. 5). However, the application of Mr. Khan reveals that he was a pilot trainee with Air East Management in 1999, one year after he graduated from New York University with a degree in Aeronautical science in 1998. Moreover, Mr. Khan was a flight instructor fro March, 1998 through May, 1999 with Mid-Island Air. (See Respondent's/Appellant's Exhibit No. 2 From the Public Hearing Transcript).

Mr. Khan moved to the United States of America when he was sixteen (16) years old and live here continually since that time. (Tr. Vol. 1, p. 234).

Mary Finnigan, at the time of her testimony on March 30, 2005, was the Vice

President Administration for the appellant, Colgan Air, Incorporated. (Transcript herein after Tr. Vol. 1, pgs. 10, 11). Ms. Finnigan had held various jobs while employed by the appellant including, but not limited to, Front Office Manager and Director of Personnel and Marketing. In the year 2001, Mrs. Finnigan was serving as Vice President of Personnel and Marketing. (Tr. Vol. 1, pgs. 15-17).

Ms. Finnigan's job duties as Vice President of Personnel and Marketing included hiring, terminations, employee benefits, marketing, advertising, and disciplinary matters. Ms. Finnigan also had the authority to suspend employees. (Tr. Vol. 1, pgs. 19, 20).

During his employment with Colgan Air, Inc., the appellee, Rao Zahid Khan was subjected to a hostile work environment. The insults were pervasive and continual. For instance, Mr. Khan was told by Captain Terry Riley statements such as, **"I don't like Muslims"**. Captain Riley specifically told the complainant, **"I don't like Pakistani's"** and **"I don't like your accent"**. Additional statements included insults such as **"you people are terrorist"**. The statement, **"you people are terrorist"** and the other statements were made prior to September 11, 2001. Captain Riley also told the complainant, **"I'll do anything to get you fired"** and **"I will ruin your career"**. Moreover, Captain Riley said, **"I will never let you be captain with Colgan, Air as long as I am here"**. Some additional insults regarding national origin included statements such as, **"Why don't you go back to Pakistan and apply with Pakistani Airlines"**. Continuing this barrage of insults Captain Riley made statements such as, **"Why did you come to America?"** (Tr. Vol. 1, p.191).



Captain Riley, who was in a supervisory capacity, asked personal questions about the complainant's wife which were extremely offensive. He asked the complainant **"Why does your wife not work"** and **"Do you have an arranged marriage?"**. He also asked, **"How is your wife in bed"**. This statement made the appellee, Rao Zahid Khan, cry while he was in the airplane. One of the worst comments occurred when Captain Terry Riley said that Rao Khan **would not be able to eat his wife and that it probably tasted like chicken anyway**. (Tr. Vol. 1, p. 192, 249, 255).

Pamela Jarrell was a graduate of Ohio University with a degree in business administration. (Tr. Vol. 1, p. 178). Ms. Jarrell had worked as a customer service agent for Allegheny Airlines in Huntington, West Virginia. She was initially hired in that position on or about November 30, 1999. She had contact with Colgan employees in that Colgan took over the Pittsburgh, Pennsylvania flights.

Pamela Jarrell knew Terry Riley since he was one of the initial captains employed by the appellant when they opened in Huntington and took over the flights going from and to Pittsburgh. (Tr. Vol. 1, p. 180).

Ms. Jarrell testified that she knew Colgan employees well since they flew in and out of Huntington daily. According to Ms. Jarrell, there was a lot of down time between flights.

Pamela Jarrell presented extremely credible evidence that the Captains employed by the appellant routinely referred to the appellee, Rao Zahid Khan, as, **"sand nigger, rag head, camel jockey"**. She also stated that these were

comments regarding the appellee, Rao Zahid Khan, such as, "he stunk, he's not very intelligent, and he did not speak good English". (Tr. Vol. 1, p. 183). These statements were made by Captain Terry Riley, Captain Ryan Hueston and Captain Jimmy Galbrath. Captains Galbrath and Riley stated that Mr. Khan would never pass a proficiency flight. (Tr. Vol. 1, p. 196, 208).

These offensive statements were made throughout the complainant's employment with the appellant until around July, 2001. Mr. Khan complained to his local supervisor, Base Chief Pilot David Mares. Although Chief Mares said he would take care of it, nothing was done about it.

Ms. Jarrell was very credible in stating that these comments were "very consistent" pervasive, and they were continually made for "months". (Tr. Vol. 1, p. 184).

**THE VICE PRESIDENT OF PERSONNEL AND MARKETING  
WAS TOLD ABOUT HARASSMENT IN MARCH AND  
APRIL, 2001 COLGAN AIR REFUSED TO INVESTIGATE  
OR REMEDY THE DISCRIMINATION**

It is extremely significant that the Administrative Law Judge made the specific Finding that Ms. Pam Jarrell "testified credibly". (See Administrative Law Judge's Decision p. 5). Yet, the Administrative Law Judge chose to arbitrarily and erroneously not to mention that Pam Jarrell specifically had complained to management, Mary Finnigan, the Vice President of Personnel and Marketing, about the discrimination and harassment against Rao Khan as early as late March or early April, 2001 and Colgan Air simply ignored the complaint.

As mentioned hereinabove, Ms. Jarrell was a graduate of Ohio University with a degree in business administration. (Tr. Vol. 1, p. 178). As a customer service agent of Allegheny Airlines in Huntington, she came in direct contact with the employees of Colgan Air, Inc. Also, Allegheny did contract labor for the petitioner in the area of customer service. (Tr. Vol. 1, p. 178).

As early as March, 2001 Pamela Jarrell contacted Mary Finnigan, Vice President of Personnel and Marketing, to complain about the blatant discrimination. Specifically, Pam Jarrell testified as follows:

Q. Did you contact Ms. Finnigan prior to that incident, days before that incident, to tell her about what was going on with Rao Khan?

A. **I contacted her. I made the phone call to her the day that Ryan Heuston wanted to leave him that day. Because there was some – and I can't tell you exactly – but some things that I felt uncomfortable with that were said that day. And that's when I contacted her. So that would have been the end of March, the first of April.**

Q. Of the year 2001?

A. Yes.

Q. Did you tell her, ma'am, that you felt like Mr. Khan was being discriminated against?

A. Yes.

Q. Did she ever call you back?

A. Yeah, she called me back. That's how she and I spoke.

Q. Did she ever call you after that? After you spoke?

A. No.

Q. **Was there anyone else that contacted you from Colgan Air regarding these concerns you had about the discrimination that Rao Kahn was suffering?**

A. **No.**

Q. Did you take to any of your co-workers or anyone about your complaint to Ms. Finnigan?

A. Not to my knowledge.

**Q. Was there any kind of investigation conducted regarding your complaint with Ms. Finnigan by any representative of Colgan Air?**

**A. Not to my knowledge.**

(Tr. Vol. 1, pgs. 202, 203)

Ms. Jarrell stated that this conduct was offensive to her and made her feel very uncomfortable. She said she thought it was discriminatory; therefore, she contacted Dave Mayers who was head pilot at the crew base, and told him they were discriminating against Mr. Khan. (Tr. Vol. 1, pgs. 185, 186, 189). According to Ms. Jarrell, Dave Mayers acknowledged that he knew these acts were occurring. Moreover, **Ms. Jarrell testified credibly that "other flight crews" and just about "everyone" knew that it was going on.** (Tr. Vol. 1, p. 187).

Unquestionably, management of Colgan Air was notified when Pamela Jarrell called Mary Finnigan in late March or early April, 2001 to tell them about the discrimination. The appellant did not investigate or do anything to remedy the harassment.

As a result of the complaints raised by Rao Khan regarding the discriminatory action and racial slurs of Terry Riley, Mary Finnigan admitted that she never called or interviewed any other employees or persons who worked at the Huntington location.

**Q. Did you call any of them to see if they were aware of any of the – whether Mr. Khan was being the victim of any type of discrimination or harassment?**

**A. Mr. Khan, as I've already stated, told me there were no witnesses to it.**

**Q. Could you answer my question yes or no.**

**A. Sure. The answer's no.**

.....  
Q. Did you call Mr. Lewis?

A. **I think I've already told you I didn't call anybody else.**

(Tr. Vol. 1, pgs. 90-92).

**HEAD PILOT OF APPELLANT AT CREW BASE IN HUNTINGTON  
WAS TOLD ABOUT THE DISCRIMINATION AND HARASSMENT  
AGAINST RAO KHAN AT LEAST TWENTY-FIVE (25) TIMES  
AND NO REMEDIAL ACTION WAS TAKEN**

The Administrative Law Judge and the Commission made a specific finding of fact in No. 7 that Pam Jarrell and the complainant went to Captain David Mayers, the appellant's lead pilot at the Huntington West Virginia crew based at least twenty-five (25) times to complain about the harassment. Specifically, the Administrative Law Judge and the Commission states:

7. Both the Complainant and Ms. Jarrell complained about the discriminatory conduct toward Complainant to the Lead Pilot for Respondent at the Huntington West Virginia crew base, Captain David Mayers. Ms. Jarrell testified credibly that Captain Mayers knew these acts were occurring and that "other flight crews" and just about **"everyone" knew it was going on. Complainant estimates he went to Dave Mayers about twenty to twenty-five times about the behavior of Captain Riley. Ms. Jarrell was specific with Captain Mayers that the dislike was a result of the fact that Complainant was "Middle Eastern".**

According to Mary Finnigan, their policy against discrimination and harassment required every employee, including Dave Mayes, to prevent and report such acts. (Tr. Vol. 1, p. 121).

It is extremely significant that the head pilot received these complaints for months, at least twenty-five (25) separate complaints, and the appellant did not investigate or even attempt to remedy or stop the harassment.

**RAO KHAN ARRANGED MEETING WITH VICE PRESIDENT  
OF PERSONNEL IN JUNE, 2001 IN MANASSAS, VIRGINIA  
SINCE APPELLANT HAD TAKEN NO ACTION TO REMEDY  
HARASSMENT FOR FOUR MONTHS AFTER MANAGEMENT  
HAD ACTUAL KNOWLEDGE OF DISCRIMINATION**

As stated hereinabove, Pamela Jarrell had already told Mary Finnigan that Rao Khan was the victim of illegal discrimination in late March or early April, 2001. Mr. Khan again complained directly to Mary Finnigan, Vice President of Personnel, about the demeaning and harassing treatment he was being forced to endure. He telephoned Ms. Finnigan and she arranged a meeting on June 20, 2001. Mr. Khan brought a hand written list of complaints regarding how he had been the victim of harassment and discrimination since 2000 when he was first employed by Colgan Air, Inc. That list included the following concerns and statements:

1. Talks about my wife;
2. From day one;
3. (Several Time) he had been saying that he would do anything in his power to get me fired;
4. Lately I've heard him say that he will get me one way or the other;
5. Said I would not be a captain as long as he's here (Captain Terry Riley trained and evaluated first officers in the simulator.) even if he did become captain I'd get him in the simulator;
6. Statement about where I come from;
7. I don't like people from there they are terrorist because you're Muslim;
8. Why did you come to America?;

9. Couldn't you get job back home?;
10. Why don't you apply with Chautauqua, Eagle, Mesaba, TSA, (ACA, they fly out of \_\_\_\_\_). They've jet. TSA jet offer;
11. If you stay here you'd be Colgan lifer. They will never get jet. You'll be flying Saab for the rest of your life;
12. How do you survive? Your wife doesn't work. Can't she work or she does not wanna work. Can she speak English.;
13. Now he's been telling around Rao can't fly the airplane;
14. I should have been in class last month or this month. I've paid my dues. I have 800 hours. (Flying time);
15. He's attacking my character: Girl.;
16. Mike Kelly never came to asked me can you or can't you fly the airplane. He misperceived me on the base of what Terry said. There 2 sides of a story.;
17. My character;
18. Ruin my career;
19. We all know about his character maybe Kelly don't;
20. He came in drunk a few times;
21. He's always late in the mornings;
22. Going on for 8 months;
23. He needs to be stopped;
24. If he doesn't stop; and
25. All I ask you to be fair  
(+/- 5 or 10 knots pilot tube and ADC.  
Incident with Ryan.);  
Meeting with (Terry) Mike Colgan, you (Mary) Jeb, Kelly, Mikey.

Chief Pilot Mike Kelley came to the meeting of June 20, 2001 because Mary Finnigan called him into the meeting. The appellee, Rao Zahid Khan, also complained that he was not being promoted to captain and other pilots were being promoted over him. (Tr. Vol. 1, p. 261).

Colgan Air did allege that they had a brief meeting or counseling session with

Captain Terry Riley in Manassas, Virginia to discuss the well documented harassment of Rao Khan after Mr. Khan met with them and presented this list of complaints and other things. Mary Finnigan stated that on July 20, 2001 she reviewed the policy on harassment and discrimination with Captain Terry Riley and a letter was placed in his file. **Yet, Ms. Finnigan never called any witnesses or employees to ascertain whether Mr. Khan's complaints were legitimate on the severity of the allegations.** The following testimony was elicited from the appellant's Vice President of personnel Mary Finnigan:

Q. **Did you call any of them to see if they were aware of any of the --- whether Mr. Khan was being the victim of any type of discrimination or harassment.**

A. Mr. Khan, as I've already stated, told me there were no witnesses to it.

Q. Could you answer my question yes or no.

A. **Sure. The answer's no.**

(Tr. Vol. 1, p. 91)

Although the appellee, Rao Zahid Khan, was told that Colgan Air would take care of the problem, nothing was done. Captain Riley never contacted Rao Khan and Rao Khan was never contacted about a test flight or any other procedure regarding becoming Captain.

Captain Terry Riley and his buddy, Captain Ryan Hueston, continued to threaten and harass Mr. Khan and the appellant's took no effective remedial action.

The appellant produced a letter dated June 20, 2001 wherein they acknowledge the allegations raised by Rao Khan were credible. The letter states,



"some of his statements are very credible because they are consistent with other reports that you have had in the past". (See Respondent's/Appellant's Exhibit No. 10).

**ON JULY 9, 2001 A CARTOON WAS POSTED IN LOBBY OF  
COLGAN AIR BY APPELLANT'S CAPTAINS AND VICIOUS  
THREATS MADE TO LIFE OF APPELLEE, RAO ZAHID KHAN,  
AND APPELLEE'S WIFE**

On or about July 9, 2001 a cartoon was posted in the Huntington Office of Colgan, Air with an insulting picture stating, **"FIY PUNJAB AIRWAYS" with camels and statements such as "not responsible for loss of life"... "animal or otherwise"**. The cartoon was drawn at the crash pad which was shared by Ryan Hueston, a former Captain, and Captain Terry Riley and posted in the public lobby of Colgan Air, Inc. This caused the appellee, Rao Zahid Khan, to break down and cry. He again telephoned Mary Finnigan. The cartoon was drawn by Captain Ryan Heuston. That evening the appellee's brother, Sami Khan, received a telephone call from Captain Terry Riley which stated that Rao had better stop calling Manassas or **"he would take care of him and his wife"**. Mary Finnigan admitted that the cartoon was offensive and clearly discriminatory (Tr. Vol. 1, p. 100, 283).

The appellee, Rao Zahid Khan, then became afraid and telephoned the Huntington Police Department. The detective came to the appellee's home and made a police report.

**HARASSERS WERE NEVER TERMINATED**  
**BY COLGAN AIR, INC.**

Even though Captain Terry Riley and Captain Ryan Hueston had made numerous comments of illegal harassment and discrimination, they were never terminated by the appellant. **Even after they had made death threats to Mr. Khan and his wife, they still were never terminated by the appellant.** They were simply permitted to resign so they could seek employment at another airline.

As the Administrative Law Judge states in Finding of Fact No. 13, Although the resignations were forced, it is important to note that **the reasons for the forced resignations, which were harassment, discrimination, and a death threat, would not be required to be disclosed to future prospective employers** under the federal Pilots Records Improvement Act. Tr. Vol. I, pages 104-112; Complainant's Exhibits No. 9 and No. 10.

It is unbelievable that this type of conduct was tolerated by this appellant, and yet they never terminated the harassers. Moreover, they never placed another letter of discipline regarding this cartoon in the personnel file.

**HARASSERS, WHO WERE CAPTAINS TERRY RILEY, RYAN HUESTON**  
**AND JIMMY GALBRATH, HAD SUPERVISORY DUTIES AND AUTHORITY**  
**OVER APPELLEE, RAO ZAHID KHAN WHO WAS A FIRST OFFICER**

Another question presented is whether the harassers, Captain Terry Riley, Ryan Hueston and Jimmy Galbrath had supervisory authority over Rao Khan, a first officer. The Commission correctly determined that the

Administrative Law Judge erroneously ruled that Captains Terry Riley, Ryan Hueston and Jimmy Galbrath were not management.

Specifically, the Judge erroneously ruled:

To prevail against the Respondent employer in a claim for a hostile or abusive workplace, the Complainant must prove that the environment is imputable on a factual basis to the employer. **The harassment of the Complainant and the hostile and abusive workplace created at the Respondent's Huntington crew base (and in the cockpit when flying with Captain Riley), were created by non management employees of the Respondent.** Where harassment does not include management personnel, liability of employer depends upon the employers' knowledge of the offensive conduct (either actual or that the employer had reason to know by the nature of the conduct), the effectiveness of its remedial procedures and the adequacy of its response.  
(See Administrative Law Judge's Decision p.23)

The following testimony from Mary Finnigan reveals that the harassers who were captains have supervisory authority over the complainant, who was a first officer:

- Q. Is the – under the chain of command at Colgan Air as it relates to flight, is the first officer under the direct supervision of the captain?
- A. The captain is responsible for the safe flight of the aircraft.
- Q. Is that a yes or a no answer?
- A. A captain is not a supervisor. He is in charge of the crew while they are on an aircraft.
- Q. Does he have the right to control the details of the first officer?
- A. I'm not sure what you mean by details.
- Q. Details of his work.
- A. Does he have the right to tell him what to do?
- Q. Yes.
- A. Yes.

- Q. And he – must the first officer comply with what he does?
- A. The first officer must comply with him as long as it's all in the safe operation. The first officer also has responsibility to speak up if it's not safe operation. And there's also – all of our pilots, as is required, go through extensive crew coordination, crew resource management, to work as a team.
- Q. So he is – your answer's that he's not a supervisor, but he must do what he tells him, is that right?
- A. The captain is in charge of the aircraft, yes. On board the aircraft.
- Q. Okay. Does the policy statement say that all employees must deal with their direct supervisor?
- A. Yes.
- Q. Does it list as the direct supervisor of the first officer, the captain?
- A. It lists that as a chain of command, yes.
- Q. Does it mean, a literal interpretation of this policy, does it mean that the captain supervises the first officer?
- A. **He supervises the first officer on board the aircraft, which is what I told you.**
- (Tr. Vol. 1. pgs. 42-45).

Additionally, the appellant's own "Statement of Policy" manual states that captains supervise first officers.

### STATEMENT OF POLICY

It is the policy of the Company that an understanding of the organizational structure is essential to the smooth running of the operation. **The company has been laid out in such a way that a direct chain of command exists from the CEO on down to all employees.** This chain can only function properly if it is kept unbroken. **For that reason, all employees must deal with their direct supervisor. For instance, crews in the field are responsible to the Captain at all times.** All contract with the company when in the field should only come from the Captain. Not only does this simplify matters, it also

insures that the Captain remains "in the loop" at all times. This simple principle is the foundation of our administrative policy. Remember: If you go around you supervisor, you take him/or out of the loop. For this reason, it will not be tolerated.

If, however, the Captain or other supervisor is the problem you wish to address; then the matter should be brought to the attention to the next person up the chain of command.

### **Flight Operations Chain of Command**

President  
Executive Vice President  
Vice President of Operations & Regulatory Compliance  
Director of Operations  
Chief Pilot  
**Captain**  
**First Officer**

(See Complainant's Exhibit No. 3).

Therefore, it is undisputed that the harassers who were captains had supervisory authority over the appellee, Rao Zahid Khan, who was a first officer.

Importantly, Ms. Jarrell testified unequivocally that she informed Mary Finnigan of the discrimination and the employees of Colgan Air never contacted her again. The next contact Mr. Jarrell had with the appellant occurred when the cartoon was posted and she faxed it to Mike Kelley, Chief Pilot. (Tr. Vol. 1, P. 205).

**ALL FIRST OFFICERS HIRED AT THE TIME OF RAO KHAN  
WERE PROMOTED TO CAPTAIN EXCEPT HIM**

Rao Khan represented un rebutted testimony that all employees of Colgan Air, Inc. hired at the same time as he was were promoted to Captain. These employees were Michael Duncan, Alan Shelton, Jeremy Poist, James Lowell, James Duviare and Dave Vonkrebs. (Tr. Vol. 1, p. 240).

Michael Duncan was promoted from a first officer to the position of Captain without taking any tests or a proficiency flight. (Tr. Vol. 1, p. 287, 288).

Michael Duncan testified that he was hired as a first officer on August 9, 2000. He was upgraded to Captain on May 15, 2001. Captain Duncan became a captain in just nine (9) months. **This promotion occurred without any type of simulation or flight proficiency test.** (See Duncan Deposition pgs. 109-113).

The appellee, Rao Khan, was denied the opportunity to become Captain and his race, nationality, religion, ancestry and complaints of discrimination and harassment were a factor in the decision to deny him the opportunity to become captain.

The appellee, Rao Khan, also presented very credible evidence that he was never counseled regarding any complaints regarding his flying. (Tr. Vol. 1, p. 245).

The chief pilot Mike Kelly and Terry Riley were "buddies". (Tr. Vol. 1, p. 256).

The following table reveals that of the pilots employed by the petitioner who failed the proficiency test in the years 2000 and 2001, only white males were retrained on the simulator after failing the proficiency test in the years 2000 and 2001.

### ***Pilots Who Failed Proficiency Test in 2000 and 2001***

<b>Name</b>	<b>Date of Hire</b>	<b>Race</b>	<b>Gender</b>	<b>Date Failed</b>	<b>Retrained</b>
Josk Musoke	May, 1999	African American	Male	6-Dec-00	NO
Jeffrey Byrd	September, 1999	White	Male	20-Aug-01	YES
Gregory Carlisle	May, 1999	White	Male	19-Aug-01	YES
John Wohner	September, 2000	White	Male	22-Dec-01	YES
Julie Porter	May, 1999	White	Female	30-Oct-01	NO
Michael Duncan	August, 2000	African American	Male	27-Nov-01	NO
Rao Khan	August, 2000	Asian	Male	30-Oct-01	NO

(Tr. Vol. 1, pgs 31 – 36)

Mary Finnigan testified that the appellant had financial trouble for a couple of months after September 11, 2001 and was unable to re-train pilots on a simulator. The appellant paid a contractor for use of a simulator machine to re-train their pilots. (Tr. Vol. 1, p. 40). The simulator costs approximately \$400.00 per hour. (Tr. Vol. 1, p. 41). Conversely, Ms. Finnigan testified that by November 27, 2001 the appellant started bringing employees back to work. In describing the financial comeback of Colgan Air, Inc., Ms. Finnigan stated as follows:

- Q. Well, what – September 11 of what year?
- A. September 11, 2002 – or excuse me, 2001, we – right after that we furloughed a lot of employees. We were not retraining people. At this time.
- Q. Okay, So are you saying that October 1 – I'm sorry, October 30 of 2001 is not right after September 11? I'm – I'm confused.

- A. What I said was that I don't know by looking at these documents if Ms. Porter was offered retraining or if she chose to resign. **I know that Mr. Duncan was offered retraining and he chose to resign.**
- Q. All right, is it your sworn testimony here today that Michael Duncan was offered to be retrained but he turned that down and resigned? Is that your sworn testimony?
- A. I'm not looking at the documents that say that. I'd have to go back and look at the documents, but I believe that is correct.
- Q. Okay, So, Mike – Julie Porter, going back to her, she was not retrained, right?
- A. I don't believe she was. But again, I don't have – if that's what it says in here she wasn't retrained, no.
- Q. Okay. And the said would be true for Michael Duncan. He was hired in August 2000 and he was African-American and he was a male. He failed his proficiency test on November 27, 2001. He was not retrained, is that correct?
- A. I believe he was offered retraining and turned it down, but again, I don't have that in this information so I can't swear to that.
- Q. Okay.
- A. At this point.
- Q. **Well, your lawyer, ma'am, just made a proffer in his opening statement that you all were having financial problems and that's the reason why you weren't retraining people –**
- A. **Okay. We did –**
- Q. Okay. Let me finish the question. After September 11. Now, is that accurate?
- A. But you're looking at November 27. At that point we had starting bring employees back. It was about – it was a short period of time. The company started to make a comeback around Thanksgiving time of that year. Mr. Duncan was also a captain. He – I'm – again, I can't swear to it, but I believe he was offered retraining and chose not to be retrained. Our situation had changed drastically in a month's time.
- Tr. Vol. 1, Pgs. 35-37)



Although the appellant stated that their financial problems had turned around within two (2) months of September 11, 2001, the evidence reveals that Michael Duncan, an African American captain, was denied the opportunity to re-train on the simulator. The appellant initially took the position that Captain Michael Duncan was offered re-training on the simulator but refused the opportunity.

### PROFICIENCY TEST

The appellee, Rao Zahid Khan, successfully passed the oral portion of the proficiency test. (Tr. Vol. 1, p. 291). The appellee, Rao Zahid Khan, was not given an approach plate the night before which is a document issued by the Federal Aviation Association (FAA) which directs the pilot on how they should approach the airport. The approach plate should be studied prior to flying into the airport. The approach plate was given to the appellee only after he had completed his oral examination. (Tr. Vol. 1, pgs. 245, 296).

Tom Brink was also present during the proficiency flight test. Tom Brink started gesturing with his hands right after the take off. The appellee, Rao Khan, was asked to do a stall but not a specific stall so the complainant did a stall and the petitioner's agents said he did not do the right stall. (Tr. Vol. 1, p. 301, 302). During the approach, Tom Brink pushed the autopilot button and took over the airplane without communicating with Mr. Khan. (Tr. Vol. 1, p. 305). The appellee, **Rao Zahid Khan, had safely landed the Saab 340 airplane while employed by the appellant anywhere from 300 – 500 times.** (Tr. Vol. 1, p. 309).

While at a cruising altitude, Tom Brink then told Mr. Khan he was going to fly the airplane. (Tr. Vol. 1, p. 318).

The appellee, Rao Zahid Khan, was thereafter told by Jeb Barrett that the Director of Flight Operations, Donnie Nunn, wanted to see him. (Tr. Vol. 1, P. 321). The appellee, Rao Zahid Khan, was told to resign or be terminated. (Tr. Vol. 1, p. 322). The appellee, Rao Zahid Khan, was told that he would not be retrained due to financial constraints. (Tr. Vol. 1, p. 322). The appellee, Rao Zahid Khan, then told the company official that he would pay for the re-training but they refused that option. (Tr. Vol. 1, p. 324).

The appellant had a written anti harassment / anti discrimination policy in its handbook in 2000 and 2001. The policy stated that the harassment or discrimination should be brought to "the appropriate person's attention in management". (Tr. Vol. 1, p. 51).

It was never explained to Rao Khan that Dave Mayers, the lead pilot located in Huntington, was not his supervisor according to Mary Finnigan. (Tr. Vol. 1, p. 53, 55).

Mary Finnigan admitted that she had an early conversation with Dave Mayers wherein Rao Khan had complained to Mr. Mayers that Captain Terry Riley was riding him. (Tr. Vol. 1, p. 56).

Mary Finnigan also admitted that Rao Khan had told her that Captain Terry Riley had come to work under the influence of alcohol. (Tr. Vol. 1, p. 57).

V.

DISCUSSION OF LAW

A. THE ADMINISTRATIVE LAW JUDGE AND THE COMMISSION  
CORRECTLY MADE FINDING THE WORK ENVIRONMENT  
WAS "EXTREMELY HOSTILE" WITH "REPEATED AND  
CONSTANT OUTRAGEOUS INSULTS"

The threshold question which must be addressed is whether the appellant had knowledge of this environment which was infested with incidences of harassment and discrimination and failed to take appropriate remedial action or whether the respondent should have known of this misconduct. The Human Rights Act imposes a duty on employers to insure that work places are free from harassment from whatever source. Hanlon v. Chambers 464 S.E. 2d 741 (W.Va. 1995).

West Virginia Human Rights act, as well as Title VII, imposes on employers a duty to ensure, as best they can, that their workplaces are free of harassment that creates hostile or offensive working environment. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.; W.Va. Code, 5-11-1 et seq. Conrad v. ARA SZABO 480 S.E.2d 801 W.Va. 1996).

Employer's liability in Human Rights Act case where source of harassment does not include management personnel depends on employer's knowledge of offending conduct, effectiveness of its remedial procedures, and adequacy of its response. W. Va. Code, 5-11-1 et. seq. Conrad v. ARA SZABO 480 S.E.2d 801 W.Va. 1996).

In "hostile environment harassment," employer discriminates against employee with respect to conditions or privileges of employment, when work place is infected, for example, by sexual barbs, innuendo's, offensive touching, or dirty tricks aimed at employee because of gender. W. Va. Code, 5-11-9 (1). Hanlon v. Chambers 464 S.E. 2d 741 (W.Va. 1995).

In his "Findings of Fact" No. 5, 6 and 7 the Administrative Law Judge and the Commission correctly made the following findings:

5. During his employment with Respondent, Complainant was subjected to an extremely hostile environment in which repeated and constant outrageous insults were directed toward him by fellow employees, Captains, Terry Riley, Jimmy Galbrath and Ryan Heuston. They referred to Complainant as **"sand nigger"**, **"rag head"** and **"camel Jockey"**. They said he **stunk**, that he **wasn't very intelligent** and that **he doesn't speak good English**. Captain Riley would repeatedly say things directly to Complainant like **"You guys are terrorists"**, **"Are you a Muslim?"**; **"All Muslims are terrorists."** Captain Riley said that **he would do anything to make sure Complainant did not get promoted** and that **he would do anything to get Complainant fired**. Additional insults included, **"Why don't you get a job with Pakistani Airlines?"** On another occasion, Captain Riley came on board an airplane that Captain Duncan was on after a female pilot had shot a low visibility approach, and stated, **"That Fucking Bitch can't fly. I've been flying all morning with a Fucking Arab and he can't fly either."** Tr. Vol. I, pages 179, 183, 190, 191, 248, 250, 253 and 254; and, Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, page 25.

6. Captain Riley also made sexually offensive comments directly to Complainant; including; **"Why does your wife not work?"**; **"Do you have an arranged marriage"**; and, even asked, **"How's your wife in bed?"** One of the worst comments made was made in the presence of Pam Jarrell, a woman working as a customer service agent, when Captain Riley said that **the**

Complainant "would not be able to eat his wife and that it probably tasted like chicken anyway." This was in reference to the fasting strictures of Complainant's faith. That same individuals also heard both **Captain Galbrath and Captain Riley say they would do anything to get Complainant fired and that he would not pass his proficiency flight.** Tr. Vol. I, pages 190, 192, 196, 249 and 250.

7. Both the **Complainant and Ms. Jarrell complained about the discriminatory conduct toward Complainant to the Lead Pilot for Respondent at the Huntington West Virginia crew base, Captain David Mayers.** Ms. Jarrell testified credibly that Captain Mayers knew these acts were occurring and that "other flight crews" and just about "**everyone**" knew it was going on. **Complainant estimates he went to Dave Mayers about twenty to twenty-five times about the behavior of Captain Riley.** Ms. Jarrell was specific with Captain Mayers that the dislike was a result of the fact that Complainant was "Middle Eastern". Captain Duncan also testified credibly that Dave Myers was aware of what he called problems between Complainant and Captain Riley (although Captain Mayers did not use the word discrimination); and that Captain Duncan had told him about the comment Captain Riley made regarding "**I've been flying with that Fucking Arab and he can't fly either.**" Vol. I, pages 185-190, 253 and 254; and, Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, page 25.

It is quite obvious that this environment was infested with illegal discrimination and harassment. Rao Khan was subject to this conduct from the date he was initially employed by the appellant, August 7, 2000 until at least July, 2001, approximately twelve (12) months.

**B. THE COMMISSION DETERMINED THAT THE ADMINISTRATIVE LAW JUDGE ERRONEOUSLY FOUND THAT THERE WAS AN INSUFFICIENT FACTUAL BASIS FOR IMPUTING THE HOSTILE AND ABUSIVE WORK ENVIRONMENT TO THE EMPLOYER**

The key question which must be addressed regarding Rao Khan's complaint of a hostile work environment is whether there is sufficient evidence to impute the liability to the employer. The following determinations outline why this appellant knew and should have known of this hostile work environment:

- (a) The vice president of personnel and marketing was told about harassment in March and April, 2001 and Colgan Air refused to investigate or remedy the discrimination;
- (b) Head pilot, Mike Mares, of appellant at crew base in Huntington was told about the discrimination and harassment against Rao Khan at least twenty-five (25) times and no remedial action was taken;
- (c) Rao Khan arranged meeting with vice president of personnel in June, 2001 in Manassas, Virginia since appellant had taken no action to remedy harassment for four months after management had actual knowledge of discrimination;
- (d) On July 9, 2001 a cartoon was posted in lobby of Colgan Air by appellant's captains and vicious threats made to life of appellee, Rao Zahid Khan, and appellee's wife;
- (e) The harassers, Captain Terry Riley, Captain Ryan Hueston and Captain Jimmy Galbrath were never terminated but were permitted to resign so they could seek other employment in the Flight Industry; and
- (f) The harassers had supervisory duties and authority over Rao Zahid Khan as a First Officer.

C. **FACTS CLEARLY ESTABLISH A FACTUAL BASIS  
FOR IMPUTING THE HOSTILE AND ABUSIVE WORK  
ENVIRONMENT TO THE EMPLOYER EVEN IF  
CAPTAINS ARE NOT SUPERVISORS**

Employers' liability in Human Rights Act case where source of harassment does not include management personnel depends on employers' knowledge of offending conduct, effectiveness of its remedial procedures, and adequacy of its response. W. Va. Code, 5-11-1 et seq. (**Conrad v. ARA SZABO** 480 S.E.2d 801 W. Va. 1996).

Even if you assume that the captains, who were the harassers and the lead captain, the highest-ranking employee at the appellant's Huntington work site, were not supervisor or members of management, the appellant is still liable. To rule otherwise would set a dangerous precedent by this Court; especially in light of the severity and nature of the threats and harassing comments.

First, appellee, Rao Khan, avers that the captains and lead captain had supervisory duties and therefore the respondent is strictly liable. Regardless, liability is easily imputed to the respondent in this case for the following reasons:

1. Pamela Jarrell, who the Administrative Law Judge determined was "very credible", specifically told Mary Finnigan, a vice president, as early as March or early April, 2001 that the complainant was the victim of illegal discrimination.
2. After having actual knowledge of the discrimination, the petitioner did not even talk to (Captain Terry Riley) for four (4) months, on or about June 20, 2001.

3. That the appellant only talked to Captain Terry Riley because the appellee, Rao Khan, was forced to travel to Manassas, Virginia with a hand written list of approximately twenty-five (25) complaints.

4. The environment was so infested with incidences of harassment and discrimination, Pamela Jarrell testified "everyone knew" about the harassment; therefore, the appellant clearly should have known of the harassment.

5. The appellant's lead pilot, Captain David Mayers, received complaints from the appellee, Rao Khan, and Pamela Jarrell at least twenty-five (25) times and never caused an investigation to occur or did anything to stop the harassment. **It is significant that Captain Mayers was the highest ranking person at the Huntington work site.** The Commission correctly refers to Captain Mayers as "middle management.

6. The harasser should have been terminated at the June 20, 2001 meeting but the petitioner chose not to conduct an investigation.

7. On July 9, 2001 a hurtful cartoon was posted by the harassers and it included threats of "loss of life".

8. After July 9, 2001 Captain Terry Riley called the appellee's brother and told him "he would take care of him and his wife" if Mr. Khan didn't stop calling Manassas, Virginia.

9. Even after all the threats, harassment and discrimination, the harassers were never terminated put permitted to resign.

This is clearly one of the worst cases of harassment, discrimination, and



intimidation ever perpetrated in this state. There is a plethora of evidence which imputes liability to this appellant.

VI.

**APPELLEE, RAO KHAN, HAS A VIABLE CLAIM OF HARASSMENT  
DUE TO A HOSTILE WORK ENVIRONMENT AND  
THIS APPELLANT IS STRICTLY LIABLE**

Another question presented is whether the appellee, Rao Khan, can establish a hostile or abusive work environment under the West Virginia Human Rights Act. Title VII of the Civil Rights Act makes it an "unlawful employment practice for an employer ... to fail or refuse to hire or to discharge... or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C.A. §200e2(a)(1). Because the work place environment is one of the "terms, conditions, or privileges of employment," see Meritor Savs. Bank v. Vinson, 477 U.S. 57, 64-67 (1986), Title VII creates a cause of action in favor of persons forced to work in a hostile workplace, see *id.* at 66 (establishing "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment"). To establish harassment based upon a hostile or abusive work environment, a plaintiff is required to prove four elements: (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis

to the employer." Spicer v. Virginia 66 F.3d 705, 710 (4<sup>th</sup> Cir. 1995) (en banc); Brown v. Perry, 184 F.3d 388, 393 (4<sup>th</sup> Cir. 1999)

In the present case, the Administrative Law Judge ruled that the complainant had established items 1, 2 and 3 above.

The sole contention regarding the hostile work environment claim was element number 4 when the Administrative Law Judge stated it is not imputable on some factual basis to the employer. **The facts are undisputed that Captains Terry Riley, Ryan Hueston and Jimmy Galbrath were supervisors of the appellee, Rao Khan, since he was a first officer. This is established by the "chain of command" policy of the appellant. Moreover, the complainant was denied a promotion and subsequently terminated. Terry Riley had refused to pass Mr. Khan on the simulator training machine. Jimmy Galbrath had caused a disciplinary write-up to be placed in Mr. Khan's file regarding his landing approach. These actions are tantamount to tangible employment actions. The appellant is strictly liable and that liability is imputed from the supervisors to the employer, Colgan Air, Inc.**

Employers may be held vicariously liable for an actionable hostile environment created **by a supervisor with immediate authority over the employee.** Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). A "supervisor" is someone with immediate or successively highly authority over the employee. Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. (1998); Hall v. Bodine Elec. Co., 276 F.3d 345, (7<sup>th</sup> Cir. 2002).

Moreover, Black's Law Dictionary defines supervisor as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, **or responsibly to direct them**, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment. National Labor Relations Act, § 2(11).

(Black Law Dictionary Fifth Ed. P. 1290)

It is clear that these captains had immediate supervisory authority over the complainant, a first officer, and therefore, this appellant is strictly liable for the actions of the captains.

In Homesley v. Freighliner Corporation, 122 F. Supp.2d 659 (W. D. N. C. 200), the detailed discussion addresses the liability of employee of a company having more than "minimal" authority. In Homesley, supra, the plaintiff was supervised by Robert Butch Yarbrough a group leader in the welding department with the defendant company.

Even though Yarbrough's harassment was not aided by the "most powerful indicators of ... threat-induced vulnerability ...", the Fourth Circuit has held that "lesser forms" of authority may be sufficient to aid supervisor harassment, *Mikels*, 183 F.3d at 333. According to the court, the victim's response may be determinative of whether a supervisor's lesser forms of authority have aided his/her harassment, See *id.*

In such less clear circumstances, the victim's response in context maybe highly probative on the issue whether any agency authority possessed by the harasser has actually aided his conduct by increasing her sense of vulnerability

and defenselessness....[W]here the level of authority had by a harasser over a victim—hence her special vulnerability to his harassment—is ambiguous, the tip-off

may well be in her response to it. Does she feel free to “walk away and tell the offender where to go,” or does she suffer the insufferable longer than she otherwise might? *Id.* at 333-34 (quoting *Faragher*, 524 U.S. at 803, 118 S. Ct. 2275).

Yarbrough’s level of authority over Plaintiff is ambiguous. As “group leader”, Yarbrough was not Plaintiff’s supervisor. He could not hire, fire, or discipline Plaintiff. However, Yarbrough did control welding assignments and the use of vacation and sick time. In addition, he reported on welders’ performance to his supervisor. Because Yarbrough’s employment relationship with Plaintiff falls into the “less clear circumstances” discussed by the Fourth Circuit in *Mikels*, the Court looks to Plaintiff’s response to Yarbrough’s harassment to determine whether Yarbrough’s harassment was “aided by the agency relationship.”

Captain Terry Riley, the main harasser, was the pilot for Colgan Air, Inc., who trained first officers. Mary Finnigan testified that Terry Riley had the authority to determine whether Rao Khan successfully completed the simulator training.

- Q. Okay. And so Captain Riley would have say as to whether Rao Khan would have successfully completed the simulation training, would he not?
- A. If he was the trainer he would, yes.  
(Tr. Vol. 1, p. 77)

Accordingly, if Captain Terry Riley determined that Rao Khan could never pass the simulator training, then he would never make captain. This action by Captain Riley would affect a tangible job benefit, including pay. This is exactly what happened in the present case.

Moreover, Captain Jimmy Galbraith, another harasser reported the performance of Rao Khan to higher supervisors. This is admitted by the appellant in its brief at page 6 where it states that Captain Jimmy Galbraith submitted an Irregularity Report Form that Mr. Khan failed to execute an approach landing. This was a form of written disciplinary action placed in the personnel file of Rao Khan.

The captains had supervisor authority aided by their agency relation with their employer, Colgan Air, Inc.

## VII.

### **THE COMMISSION FOUND THAT THE APPELLEE PRESENTED A VIABLE CLAIM OF DISPARATE TREATMENT**

Another key issue in the present case is whether the appellee successfully presented a claim of disparate treatment when he was the most senior first officer in training class and all other first officers were promoted to Captain without a proficiency flight test and the complainant was never promoted to Captain. In other words, was the appellee's race, religion, national origin ancestry or his prior complaint of discrimination an illegal factor in the decision not to promote him.

The term "discriminate" or discrimination" means to exclude from, or fail to refuse to extend to, a personal equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness or handicap and includes to separate or segregate. (W. Va. Code §5-11-3 (h)).

This State's Honorable Court established the requirements for proving a prima facie case of discrimination.

We, therefore, now propose a general test for determining whether the plaintiff has made a prima facie case of impermissible employment discrimination. In order to make a prima facie case of employment discrimination, the plaintiff must prove:

- (1) That the plaintiff is a member of a protected class.
- (2) That the employer made an adverse decision concerning the plaintiff.
- (3) But for the plaintiff's protected status, the adverse decision would not have been made.

**Conaway v. Eastern Associated Coal Company**, 358 S.E. 2d 423 (W. Va. 1986).

The plaintiff may successfully establish a reprisal claim by showing that these elements co-existed:

- (1) That he had previously filed a prior discrimination charge;
- (2) That the defendant had actual knowledge of his prior complaint;
- (3) That there was an adverse action;
- (4) That there was a causal connection;

Retaliatory motives may be inferred when the employer treats the employee differently from similarly situated non-protesting employees. **EEOC v. Operating Engineers, Local 14 and 15** 438 F. Supp. 876 (S.D.N.Y. 1977).

**A. DENIAL OF OPPORTUNITY TO BECOME CAPTAIN**

The appellee, Rao Khan, represented un rebutted testimony that all employees of Colgan Air, Inc. hired at the same time as he was hired were promoted to Captain. These employees were Michael Duncan, Alan Shelton, Jeremy Poist, James Lowell, James Duviare and Dave Vonkrebs. (Tr. Vol. 1, p. 240).

Michael Duncan was promoted from a first officer to the position of Captain without taking any tests or a proficiency flight. (Tr. Vol. 1, p. 287, 288).

Michael Duncan testified that he was hired as a first officer on August 9, 2000. He was upgraded to Captain on May 15, 2001. Captain Duncan became a captain in just nine (9) months. This promotion occurred without any type of simulation or flight proficiency test. (See Duncan Deposition pgs. 109-113).

**B. PROFICIENCY TEST**

The appellee, Rao Khan, successfully passed the oral portion of the proficiency test. (Tr. Vol. 1, p. 291). The appellee, Rao Khan was not given an approach plate the night before which is a document issued by the Federal Aviation Association (FAA) which directs the pilot on how they should approach the airport. The approach plate should be studied prior to flying into the airport. The approach plate was given to the appellee, Rao Khan, only after he had completed his oral examination. (Tr. Vol. 1, pgs. 245, 296).

Tom Brink was also present during the proficiency flight test. Tom Brink started gesturing with his hands right after the take off. The appellee, Rao Khan, was

asked to do a stall but not a specific stall so the appellee, Rao Khan, did a stall and the appellant's agents said he did not do the right stall. (Tr. Vol. 1, p. 301, 302). During the approach, Tom Brink pushed the autopilot button and took over the airplane without communicating with the appellee, Rao Khan. (Tr. Vol. 1, p. 305). The appellee, Rao Khan, had safely landed the Saab 340 airplane while employed by the respondent anywhere from 300 – 500 times. (Tr. Vol. 1, p. 309).

While at a cruising altitude, Tom Brink then told the complainant he was going to fly the airplane. (Tr. Vol. 1, p. 318).

The appellee, Rao Khan, was thereafter told by Jeb Barrett that the Director of Flight Operations, Donnie Nunn, wanted to see him. (Tr. Vol. 1, P. 321). The appellee, Rao Khan, was told to resign or be terminated. (Tr. Vol. 1, p. 322). The complainant was told that he would not be retrained due to financial constraints. (Tr. Vol. 1, p. 322). The appellee, Rao Khan, then told the company official that he would pay for the re-training but they refused that option. (Tr. Vol. 1, p. 324).

**C. ONLY WHITE MALES WERE OFFERED THE OPPORTUNITY TO RETRAIN ON THE SIMULATOR AFTER A FAILED FLIGHT PROFICIENCY TEST IN 2000 AND 2001**

The chief pilot Mike Kelly and Terry Riley were "buddies". (Tr. Vol. 1, p. 256).

The following table reveals that of the pilots employed by the petitioner who failed the proficiency test in the years 2000 and 2001, only white males were retrained on the simulator after failing the proficiency test in the years 2000 and 2001.



### ***Pilots Who Failed Proficiency Test in 2000 and 2001***

<b>Name</b>	<b>Date of Hire</b>	<b>Race</b>	<b>Gender</b>	<b>Date Failed</b>	<b>Retrained</b>
Josk Musoke	May, 1999	African American	Male	6-Dec-00	NO
Jeffrey Byrd	September, 1999	White	Male	20-Aug-01	YES
Gregory Carlisle	May, 1999	White	Male	19-Aug-01	YES
John Wohner	September, 2000	White	Male	22-Dec-01	YES
Julie Porter	May, 1999	White	Female	30-Oct-01	NO
Michael Duncan	August, 2000	African American	Male	27-Nov-01	NO
Rao Khan	August, 2000	Asian	Male	30-Oct-01	NO

(Tr. Vol. 1, pgs 31 – 36)

The appellant can not explain why only white males were granted re-training on the simulator except to say the Josk Musoke is not similarly situated. The truth of the matter is that Colgan Air, Inc. has no explanation for its refusal to retrain only white males because its position as stated by the Administrative Law Judge simply "does not hold".

D. THE COMMISSION FOUND THAT THE ADMINISTRATIVE  
LAW JUDGE'S RULING REGARDING PRETEXT WAS  
ERRONEOUS IN THAT JUDGE ADMITTED THAT THE  
PROFFERED REASON OF FINANCIAL PROBLEMS  
"DOES NOT HOLD"

The Administrative Law Judge states, The Respondent offers as a legitimate non discriminatory reason for these differences, that it was not in a financial position to allow it to pay to retrain pilots during the time that most of the non retrained pilots failed their proficiency examinations. "Although the explanation **does not hold**" for the first failed check ride, Josk Musoke, who failed his in August, 2001.

Mary Finnigan testified that the appellant had financial trouble for a couple of months after September 11, 2001 and was unable to re-train pilots on a simulator. The appellant paid a contractor for use of a simulator machine to re-train their pilots. (Tr. Vol. 1, p. 40). The simulator costs approximately \$400.00 per hour. (Tr. Vol. 1, p. 41). Conversely, Ms. Finnigan testified that by November 27, 2001 the appellant started bringing employees back to work. In describing the financial comeback of Colgan Air, Inc., Ms. Finnigan stated as follows:

Q. Well, what – September 11 of what year?

A. September 11, 2002 – or excuse me, 2001, we – right after that we furloughed a lot of employees. We were not retraining people. At this time.

Q. Okay, So are you saying that October 1 – I'm sorry, October 30 of 2001 is not right after September 11? I'm – I'm confused.

A. What I said was that I don't know by looking at these documents if Ms. Porter was offered retraining or if she chose to resign. **I know that Mr. Duncan was offered retraining and he chose to resign.**

Q. All right, is it your sworn testimony here today that Michael Duncan was offered to be retrained but he turned that down and resigned? Is that your sworn testimony?

A. I'm not looking at the documents that say that. I'd have to go back and look at the documents, but I believe that is correct.

Q. Okay, So, Mike – Julie Porter, going back to her, she was not retrained, right?

A. I don't believe she was. But again, I don't have – if that's what it says in here she wasn't retrained, no.

Q. Okay. And the said would be true for Michael Duncan. He was hired in August 2000 and he was African-American and he was a male. He failed his proficiency test on November 27, 2001. He was not retrained, is that correct?

A. I believe he was offered retraining and turned it down, but again, I don't have that in this information so I can't swear to that.

Q. Okay.

A. At this point.

Q. **Well, your lawyer, ma'am, just made a proffer in his opening statement that you all were having financial problems and that's the reason why you weren't retraining people –**

A. Okay. We did –

Q. Okay. **Let me finish the question. After September 11. Now, is that accurate?**

A. But you're looking at November 27. At that point we had starting bring employees back. It was about – it was a short period of time. **The company started to make a comeback around Thanksgiving time of that year. Mr. Duncan was also a captain. He – I'm – again, I can't swear to it, but I believe he was offered retraining and chose not to be retrained. Our situation had changed drastically in a month's time.**

(Tr. Vol. 1, Pgs. 35-37)

Although the appellant stated that their financial problems had turned around within two (2) months of September 11, 2001, the evidence reveals that Michael Duncan, an African American captain, was denied the opportunity to re-train on the simulator when he failed. The appellant initially took the position that Captain Michael Duncan was offered re-training on the simulator but refused the opportunity.

Moreover, Captain Michael Duncan testified that he was never offered re-training even though the appellant's witness, Mary Finnigan, testified that he was offered re-training because the company had recovered financially. (See Telephonic Evidentiary Deposition of Michael Duncan pgs. 41, 42).

The uncontroverted evidence reveals that Colgan Air stated that the complainant was not offered re-training due to financial difficulty they experienced for two (2) months after September 11, 2001. The truth of the matter is only white males were offered retraining in the years 2000 and 2001. This fact is especially highlighted by the fact that Michael Duncan, a black male, was not offered retraining on November 27, 2001, after the financial difficulty was over. Conversely, John Wohner, a white male, was offered retraining and was retrained by the respondent on the simulator on December 2, 2001.

The reasons for the disparate treatment were no more than a pretext for the disparate treatment.

#### VIII.

#### **THE COMMISSION HAS AUTHORITY TO AWARD INCIDENTAL DAMAGES WHICH HAVE BEEN ADJUSTED DUE TO INFLATION**

The final question presented is whether the Commission can award five thousand dollars (\$5,000.00) as incidental damages as compensation for the severe mental anguish suffered at the hands of this respondent.

The West Virginia Human Rights Commission as part of its cease and desist orders may award to complainant incidental damages as compensation for humiliation, embarrassment, emotional and mental distress and loss

of personal dignity, without proof of monetary loss. State Human Rights Comm'n v. Pearlman Realty Agency, 161 W. Va. 1, 239 S.E.2d 145 (1977).

Based on the egregious facts in this case, it is clear that the commission has not only the right but the duty to award incidental damages. Moreover, the five thousand dollars (\$5,000.00) has been adjusted due to inflation and does not infringe on the appellant's right to a jury trial. (See Bishop Coal Co. v. Salyers, 380 S.E.2d 238 (W. Va. 1989).

### IX.


### CONCLUSION

For the reasons outlined herein, the Final Decision of the Administrative Law Judge was clearly wrong in light of the substantial evidence of record. The Final Order of West Virginia Human Right Commission is obviously a correct application of the law and the Final Decision of the West Virginia Human Rights Commission must be affirmed.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLGAN AIR, INC.,

Appellant,

v.

APPEAL NUMBER: 070285  
(West Virginia Human Rights Commission  
Docket No. ERRELNOANCsREP-391-02)

WEST VIRGINIA HUMAN RIGHTS  
COMMISSION AND RAO ZAHID KHAN

Appellees.

CERTIFICATE OF SERVICE

I, Dwight J. Staples, Esq. counsel for Appellee, Rao Zahid Khan, hereby certify that a copy of the foregoing **BRIEF OF THE APPELLEE, RAO ZAHID KHAN** was served upon all counsel of record by United States mail, postage prepaid, a true and exact copy, as follows this 6<sup>th</sup> day of June, 2007, on the following:

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